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No. 98-796

In the
Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

FLORIDA BOARD OF REGENTS, et al.,
Respondents.

On Writ of Certiorari to the United States Court
of Appeals for the Eleventh Circuit

**BRIEF AMICUS CURIAE OF PACIFIC LEGAL
FOUNDATION IN SUPPORT OF RESPONDENTS**

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QUESTIONS PRESENTED

Questions presented: (1) Does the ADEA contain clear abrogation of state's 11th Amendment immunity from suit by individuals? (2) Was the extension of the ADEA to states a proper exercise of Congress' power under section 5 of the Fourteenth Amendment, thereby constituting a valid exercise of congressional power to abrogate the states' Eleventh Amendment immunity from suit by individuals?

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IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37,¹ Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of Respondents, Florida Board of Regents. Written consent for amicus participation in this case was granted by counsel for all parties and lodged with the Clerk of the Court.

Founded 26 years ago, PLF is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. Incorporated as a nonprofit public interest foundation under the laws of California, PLF litigates matters affecting the public interest at all levels of state and federal courts. Representing the views of thousands of supporters nationwide, PLF is an advocate in favor of limited government, individual rights, and free enterprise. PLF supports the concepts of federalism and limited government and believes public officials must be respectful of the constitutional limitations on federal power.

This case is another example of Congress' myriad attempts to expand federal power beyond what is provided under the United States Constitution. How this Court answers the questions raised in this case will determine the scope of congressional power, and can reinforce that Congress may not amend the Constitution through ordinary legislation. Pacific Legal Foundation has a long history of amicus curiae participation in this Court and believes its perspective on the need for limiting Congress to its enumerated powers will provide a necessary viewpoint on the issues presented in this case.

¹ Pursuant to Supreme Court Rule 37.6, amicus curiae Pacific Legal Foundation states that no counsel for a party to this action authored any portion of this brief and that no person or entity, other than amicus curiae, made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

Although nearly 200 years have passed since this Court's decision in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) the struggle over who is entrusted with the power to interpret the Constitution continues to the present. Whether the issue is the Religious Freedom Restoration Act (RFRA), or the Age Discrimination in Employment Act (ADEA), Congress fails to recognize that it is limited to its enumerated powers, and may not reinterpret the Constitution under the guise of enforcing it.

This settled understanding was reaffirmed in *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997), when this Court held that Congress' power under section 5 of the Fourteenth Amendment was limited to enforcing the provisions of the Fourteenth Amendment, and did not include the power to redefine the substance of its protections. *Id.* at 2164. This limitation on Congress' power has been recognized since the earliest cases under the Fourteenth Amendment. In the *Civil Rights Cases*, 109 U.S. 3 (1883), the Court held that section 5 did not empower Congress to pass "general legislation upon the rights of the citizen, but corrective legislation," *id.* at 13, to "provide modes of redress against the operation of state laws, and the action of state officers . . . when these are subversive of the fundamental rights specified in the amendment." *Id.* at 11. Thus, Congress may adopt only prophylactic legislation under section 5, and take the drastic step of abrogating the sovereign immunity of the states, in response to "widespread and persisting depravation of constitutional rights." *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, No. 98-531, 1999 WL 412723, *11 (1999).

To ensure that Congress adopts only appropriate prophylactic legislation, there must be a "congruence" and "proportionality" between the injury prevented or remedied and the means adopted to that end. *Boerne*, 117 S. Ct. at 2164. Requiring such a connection ensures that Congress' exercise of

section 5 power is grounded in the substance of the right enforced. Failing to require congruence and proportionality frees Congress from the rights recognized in section 1, and empowers Congress to legislate generally upon nearly all aspects of life, liberty, and property.

Congress, in adopting the ADEA, has moved from addressing constitutional violations by the states, to changing the substance of the rights under the Fourteenth Amendment. Whereas age-based classifications are subject to rational basis review under the Equal Protection Clause, the ADEA substitutes a much higher standard in its place, and subjects age-based classifications to the same exacting standard as those based upon race. Unlike discrimination based on race or gender, this country does not have a history of pervasive discrimination against the aged. There is simply no need to "provide modes of redress against the operation of state laws, and the action of state officers." *Civil Rights Cases*, 109 U.S. at 11. On each occasion this Court has examined mandatory retirement ages under the Equal Protection Clause, they have withstood scrutiny. *Gregory v. Ashcroft*, 501 U.S. 452, 473 (1991); *Vance v. Bradley*, 440 U.S. 93, 98-109 (1979); *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 315-16 (1976). Because the ADEA deviates grossly from Equal Protection Clause standards, and there is no likelihood that the ADEA will prevent or remedy unconstitutional behavior by the states, under the *Boerne* precedent, the ADEA is by no means a "congruent" or "proportional" response to state violations of the Fourteenth Amendment.

ARGUMENT

I

ENFORCEMENT HAS ITS LIMITS—WHEN EXERCISING ITS POWER UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT, CONGRESS MAY NOT GRANT GREATER RIGHTS THAN THE FOURTEENTH AMENDMENT ITSELF PROVIDES

The founding fathers were concerned that a federal government with excessive powers would pose a threat to individual liberties and the sovereignty of the several states. Whereas the states were previously considered the primary protectors of individual liberties, in the post-civil war era there arose a need for protection from state-sponsored discrimination. The Fourteenth Amendment was enacted to prohibit the states from making or enforcing “any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const., amend. XIV, § 1. Congress, under section 5 of the Fourteenth Amendment, is entrusted with the power “to enforce by appropriate legislation” these guarantees. Ironically, since the ratification of the Fourteenth Amendment, the situation has come full circle, and individuals are forced to fight racial and gender preferences imposed by Congress, and the federal government is again a threat to the sovereignty of the states. This Court must decide whether Congress is limited to those actions tailored to enforce the guarantees of the Fourteenth Amendment, thereby ensuring that the founding fathers’ concern over an all too powerful Congress does not come to fruition, or whether the Fourteenth Amendment empowered Congress to obliterate state sovereignty in all circumstances simply by asserting that it is “enforcing” the Equal Protection Clause.

A. Congress May Not *Redefine* the Scope or Substance of Fourteenth Amendment Protections Under the Guise of *Enforcing* the Amendment

Since the early days of our republic, there has been an ever-present struggle over which branch of government is the final arbiter of the Constitution's meaning. Although nearly 200 years have passed since the decision in *Marbury v. Madison*, 5 U.S. 137 (1803), Congress fails to recognize that the

powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written. . . . It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; *or, that the legislature may alter the constitution by an ordinary act.*

Id. at 176-77 (emphasis added). As evidenced by the Religious Freedom Restoration Act of 1993 (RFRA), the Age Discrimination in Employment Act (ADEA), and quite possibly the Americans with Disabilities Act (ADA), Congress has sought to expand upon the rights granted under the Fourteenth Amendment through ordinary legislation "enforcing" those rights.

It is undisputed that section 5 of the Fourteenth Amendment is "a positive grant of legislative power" to Congress. *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966). However, Congress' section 5 power has inherent limitations. These limitations are imposed by the commitment of the power to interpret the Constitution to the judiciary, and the very language of section 5 itself— "Congress shall have the power to *enforce*, by appropriate legislation, the provisions of this article." U.S. Const., amend. XIV, § 5 (emphasis added). Congress was not given a blank check to legislate generally, deciding what "equal protection of the laws" means. By

definition, Congress may take action only to *enforce* those guarantees, not *redefine* their substance. *See Boerne v. City of Flores*, 117 S. Ct. at 2164. Thus, just as section 1 imposes a floor of conduct below which the states may not fall, it also creates a ceiling for the exercise of Congress' enforcement power.

The Court addressed the relationship between section 1 and Congress' enforcement power in the *Civil Rights Cases*, 109 U.S. 3 (1883). The Court stated that Congress' *enforcement* power is the power

to adopt appropriate legislation for *correcting the effects of such prohibited state law and state acts*, and thus to render them effectually null, void, and innocuous. This is the legislative power conferred upon congress and this is the whole of it. It does not invest congress with power to legislate upon subjects which are within the domain of state legislation; but to provide modes of relief against state legislation, or state action, of the kind referred to.

Id. at 11.

Thus, an exercise of Congress' section 5 power presupposes the existence of state laws or state officials contravening the rights recognized under the Fourteenth Amendment. The Fourteenth Amendment was never intended to obliterate state sovereignty in all circumstances, replacing the states as the primary protectors of individual rights.

[Section 5] does not authorize congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of state laws, and the action of state officers, executive or judicial, when these are subversive of the fundamental rights specified in the amendment.

Id. It bears repeating that “such legislation must necessarily be predicated upon such supposed state laws or state proceedings, and be directed to the correction of their operation and effect.” *Id.* at 11-12 (emphasis added).

In *Equal Employment Opportunity Commission v. Wyoming*, 460 U.S. 226 (1983) (5-4 decision) (Burger, J., dissenting), four justices believed that the bounds of congressional power under the Thirteenth, Fourteenth, and Fifteenth Amendments may be murky, but at the very least, “Congress may act only where a violation lurks.” *Id.* at 259-60. And when determining whether a constitutional violation is present, Congress must follow the judiciary’s interpretation of the Constitution. That is quite different from asserting that Congress is precluded from deciding whether enforcement actions are necessary. Congress may hold hearings to determine whether, in fact, a state or states are discriminating against the aged in violation of the Fourteenth Amendment. Such hearings are contemplated by Congress’ role in determining whether a remedy is necessary, and are essential for Congress to limit the scope of any such remedy. To invoke section 5, “Congress . . . must identify conduct transgressing the Fourteenth Amendment’s substantive provisions, and must tailor its legislative scheme to remedying or preventing such conduct.” *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, No. 98-531, 1999 WL 412723, at *8 (1999). But when Congress redefines what constitutes a constitutional violation, deviating from the Court’s interpretation, Congress usurps the judicial role and exceeds its section 5 *enforcement* powers.

B. Enforcement Legislation Under section 5 of the Fourteenth Amendment Must Be Directed to Countering Unconstitutional State Activity Instead of Legislating All Aspects of Life, Liberty, and Property

The limited nature of Congress' section 5 power reflects the continuing concern that the federal government not be given the power to legislate generally upon life, liberty, and property, defining them and providing for their vindication.

It is absurd to affirm that, because the rights of life, liberty, and property (which include all civil rights that men have) are by the amendment sought to be protected against invasion on the part of the state without due process of law, congress may, therefore, provide due process of law for their vindication in every case; and that, because the denial by a state to any persons of the equal protection of the laws is prohibited by the amendment, therefore congress may establish laws for their equal protection.

Civil Rights Cases, 109 U.S. at 13.

One could argue that based upon some of this Court's earlier decisions, there need not be a constitutional violation before Congress may act against the states, and that Congress may expand upon the rights contained in section 1. Simply stated, such assertions are flatly, and fundamentally, wrong. *See Boerne*, 117 S. Ct. at 2167-68. In spite of the broad language the Court has occasionally used to describe Congress' power,

the power granted to Congress was not intended to strip the States of their power to govern themselves or to convert our national government of enumerated powers into a central government of unrestrained authority over every inch of the whole Nation.

Oregon v. Mitchell, 400 U.S. 112, 128 (1970) (opinion of Black, J.). Congress' exercise of section 5 power may only be upheld if the acts outlawed "have a significant likelihood of being unconstitutional." *Boerne*, 117 S. Ct. at 2170.

This Court recently applied the *Boerne* analysis to the extension of the Patent Remedy Act to the States, focusing on whether the Patent Remedy Act was "remedial or preventative legislation aimed at securing the protections of the Fourteenth Amendment for patent owners." *Florida Prepaid*, 1999 WL 412723, at *8. Negating any argument that the Patent Remedy Act was necessary to remedy constitutional violations by the states, Congress had identified no pattern of patent infringement by the States, let alone a pattern of constitutional violations. *Id.*

The legislative record thus suggests that the Patent Remedy Act does not respond to a history of "widespread and persisting deprivation of constitutional rights" of the sort Congress has faced in enacting proper prophylactic § 5 legislation.

Id. at 11 (quoting *Boerne*, 117 S. Ct. at 2167). The dearth of constitutional violations rendered the provisions of the Patent Remedy Act "so out of proportion to a supposed remedial or preventive object that they cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *Id.* However desirable the policy embodied in the Patent Remedy Act may be, it was not founded upon a history that justified an invasion of the sovereign immunity of the states.

Even where Congress has outlawed state practices that were facially constitutional, Congress has acted against a backdrop of discriminatory applications of the law. There need not be an adjudication that a particular state law is unconstitutional before Congress may act, but at the very least there must be a constitutional violation as a basis for any enforcement actions. *Boerne*, 117 S. Ct. at 2170. It is in this context that

[I]legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States.'

Id. at 2163 (citing *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976)).

In *Katzenbach v. Morgan*, 384 U.S. 641, the Court addressed whether the portions of the Voting Rights Act of 1965, eliminating English literacy tests, were appropriate legislation to enforce the Equal Protection Clause. The Voting Rights Act provided that no person who has successfully completed the sixth primary grade in a public school in, or a private school accredited by, the Commonwealth of Puerto Rico shall be denied the right to vote in any election because of an inability to read English. *Id.* at 643 n.1. Although the Court has previously upheld English literacy tests elsewhere, *Lassiter v. Northampton County Board of Elections*, 360 U.S. 45 (1959), the historical use of English literacy tests to disenfranchise New York citizens of Puerto Rican descent brought the prohibition of such tests within the scope of Congress' section 5 power. See *Katzenbach*, 384 U.S. at 654 n.12, n.13, n.14. The Court viewed the Act as a "measure to secure for the Puerto Rican community residing in New York nondiscriminatory treatment by government." *Id.* at 652. In spite of the broad language used by the Court, Congress' exercise of its *enforcement* power did not require Congress to define equal protection guarantees, or grant greater rights than the Equal Protection Clause itself grants. Congress merely acted to

enforce submission to the prohibitions [the Fourteenth Amendment] contain[s], and to secure to all persons the enjoyment of perfect equality of civil

rights and the equal protection of the laws against State denial or invasion.

Ex parte Com. of Virginia, 100 U.S. 339, 346 (1879).

Just four months prior to *Katzenbach v. Morgan*, the Court considered Congress' enforcement power under the Fifteenth Amendment in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966). There, the Court upheld other portions of the Voting Rights Act after examining the history leading up to its passage, including the persistent use of facially neutral tests to discriminate against segments of the population. *See id.* at 308-15. South Carolina's argument that Congress was limited to merely prohibiting discrimination was resoundingly rejected. *Id.* at 327. Congress clearly could prescribe prospective remedies to combat pervasive discrimination, and confine those remedies to the states where the discrimination was occurring. *Id.* at 328. These remedial measures under the Voting Rights Act did not change the substance of voting rights, but were necessitated by "widespread and persisting deprivation of constitutional rights," *Boerne*, 117 U.S. at 2167, and secured the equal protection rights of all citizens.

Thus, while Congress has had some latitude in crafting remedies for violations of the Fourteenth Amendment, the touchstone for the validity of prophylactic section 5 legislation has always been the existence of invidious discrimination in violation of the Constitution, with congressional efforts limited to *enforcing* the guarantees of section 1 against such violations. Without widespread and persisting constitutional violations by the states, the drastic measure of abrogating the sovereign immunity of the states is unwarranted, and threatens to replace our federal system with a central government of unlimited powers.

**C. Requiring “Congruence and Proportionality”
Between Congress’ Exercise of section 5 Power and
the Rights to Be Protected Ensures That Congress
Is Not *Expanding* Rights Under the Guise of
Enforcing Rights**

The test has been stated a number of ways, but regardless of how it has been framed, Congress’ exercise of its enforcement power has always been required to have a congruence and proportionality to the constitutional rights protected and the violations to be prevented or remedied. *See Boerne*, 117 S. Ct. at 2164. This is a reflection of the remedial, non-substantive nature of Congress’ enforcement power. *Id.* Other interpretations of Congress’ power would be inconsistent with the language and history of the Fourteenth Amendment, and would permit Congress to expand Constitutional rights through ordinary legislation. *Id.* at 2166. *Civil Rights Cases*, 109 U.S. at 13-14, 15.

Many pre-*Boerne* decisions have relied upon the Court’s formulation of Congress’ power under the Necessary and Proper Clause, Article I, section 8, clause 18, established by Chief Justice Marshall in *McCulloch v. Maryland*, 17 U.S. 316 (1819):

Let the end be legitimate, *let it be within the scope of the constitution*, and all means which are appropriate, *which are plainly adapted to that end*, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

Id. at 421 (emphasis added). This language ensures that Congress’ use of the enforcement power is grounded in the substance of the constitutional right enforced (within the “scope of the constitution”), and relates to the nature and extent of the constitutional violation (“plainly adapted to that end”). Congress’ adoption of the Voting Rights Act is an example of a remedy to end violations of the Fourteenth and Fifteenth

Amendments, related in both nature and extent to the constitutional violations present.

In *Boerne*, the Court provided a clear statement of the scope of Congress' enforcement power:

While preventative rules are sometimes appropriate remedial measures, there must be a congruence between the means used and the ends to be achieved. The appropriateness of remedial measures must be considered in light of the evil presented. Strong measures appropriate to one harm may be an unwarranted response to another, lesser one.

Boerne, 117 S. Ct. at 2169.

Failing to require congruence and proportionality between exercise of section 5 power and the rights to be protected empowers Congress to define the substance of section 1 of the Fourteenth Amendment. Contrary to the Court's understanding in the *Civil Rights Cases*, freed from the limits of section 1, Congress would be able to legislate generally upon life, liberty, and property. Such an interpretation permits Congress to do violence to the Court's interpretation of what "equal protection" means, and makes the Constitution no different from any statute passed by Congress.

If Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be "superior paramount law, unchangeable by ordinary means." It would be "on a level with ordinary legislative acts, and, like other acts, . . . alterable when the legislature shall please to alter it."

Boerne, 117 S. Ct. at 2168 (citing *Marbury*, 5 U.S. at 177).

Whether under the terms used in *McCulloch* (within the scope of the Constitution and plainly adapted to that end), 17 U.S. at 421, or *Boerne* (congruence and proportionality), 117 S. Ct. at 2164, Congress' use of its enforcement power must be tied to the constitutional rights enforced, and directed to unconstitutional state actions. Congress cannot use its enforcement power to force the states to go further than the Constitution itself requires, or grant citizens greater "constitutional protections" against the states than the Constitution itself grants.

II

THE ADEA PROVIDES CITIZENS WITH GREATER RIGHTS THAN THE CONSTITUTION ITSELF PROVIDES, CROSSING THE LINE FROM ENFORCEMENT TO AN IMPERMISSIBLE REINTERPRETATION OF RIGHTS

A. Congress' section 5 Power Extends Only to Requiring a Rational Basis for Age-Based Classifications

It is well settled that unlike suspect classifications, age-based classifications are subject to rational basis review under the Equal Protection Clause. *See City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 441 (1985); *Vance v. Bradley*, 440 U.S. 93, 97 (1979); *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 313-14 (1976). Nor are age-based classifications so invidious that they are presumptively invalid like those based upon race. *See Adarand v. Pena*, 515 U.S. 200, 234 (1995). Equal protection analysis only requires strict scrutiny of classifications that impermissibly interfere with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class. *Murgia*, 427 U.S. at 312. Age-based classifications such as mandatory retirement limits implicate neither situation.

While the treatment of the aged in this Nation has not been wholly free of discrimination, such persons, unlike, say, those who have been discriminated against on the basis of race or national origin, have not experienced a “history of purposeful unequal treatment” or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities.

Id. at 313. In such a case, the Court

will not overturn such a [classification] unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature’s actions were irrational.

Bradley, 440 U.S. at 97.

Nevertheless, even rational basis review places limits on the states that Congress or individuals may seek to enforce. Irrational classifications or those motivated by animus fail rational basis scrutiny. *Cleburne*, 473 U.S. at 446-47; *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 83 (1988) (“arbitrary and irrational discrimination violates the Equal Protection Clause under even [the] most deferential standard of review”).

Perfection in the crafting of age-based classifications is neither possible nor necessary, *Dandridge v. Williams*, 397 U.S. 471, 485 (1970), and under rational basis review, equal protection requirements tolerate some measure of under-inclusiveness and overinclusiveness. *Vance*, 440 U.S. at 109. A classification may appear irrational when applied to a particular individual, but that is not the proper analysis—to violate the Equal Protection Clause *the classification itself* must have no rational basis. *Id.* And these limitations on the reach of

the protections under section 1 also serve as a limit on Congress' exercise of section 5 powers.

It is important to note that age discrimination claims rarely survive the rational basis standard under the Equal Protection Clause. This Court's rulings on mandatory retirement ages are particularly enlightening. On the three occasions this Court has reviewed mandatory retirement ages, each has been upheld under equal protection scrutiny. *Gregory v. Ashcroft*, 501 U.S. 452, 473 (1991); *Vance*, 440 U.S. at 98-109; *Murgia*, 427 U.S. at 315-16. In each case, the state's rational basis was enough to satisfy the Equal Protection Clause. *Id.* This hardly constitutes a history of pervasive and invidious discrimination against the aged justifying prophylactic legislation abrogating the sovereign immunity of the states.

If there is no existing history of violations of constitutional rights, what is there to correct? In the absence of state activities that are violating the equal protection rights of citizens, there is no occasion for Congress "*to adopt appropriate legislation for correcting the effects of such prohibited state laws and state acts, and thus to render them effectually null, void, and innocuous.*" *Civil Rights Cases*, 109 U.S. at 11. In this case, because the ADEA is not directed to state practices that "have a significant likelihood of being unconstitutional" under rational basis review, the ADEA lacks proportionality to any violations of the Constitution, and is in excess of Congress' section 5 powers. *Boerne*, 117 S. Ct. at 2170.

B. The ADEA Is Not Congruent to Equal Protection Clause Standards and Prohibits Age-Based Classifications That Satisfy the Constitution

Unlike the Equal Protection Clause, which requires only a rational basis for age-based classifications, the ADEA substitutes a much more difficult objective standard in its place. Unless the employer can prove the classification or bona fide occupational qualification (BFOQ) is "*reasonably necessary to*

the operation of the particular business," 29 U.S.C. § 623(f)(1), the employer is guilty of age discrimination. This is true even if the classification satisfies the Equal Protection Clause.

The disparity between the Equal Protection Clause and ADEA is highlighted by *Hahn v. City of Buffalo*, 596 F. Supp. 939 (1984), *aff'd* 770 F.2d 12 (2d Cir. 1985). In *Hahn*, applicants for police officer, some of whom were over 40 years of age, filed suit challenging a New York statute providing that no person over 29 years of age shall be eligible for appointment as a police officer. 596 F. Supp. at 942 n.1. The trial court applied rational basis review, and found that the maximum hiring age was "rationally related to the goal of maintaining an efficient and safe police department." *Id.* at 944.

The court notes that this inquiry is vastly different from the analysis required by the plaintiffs' claim under the ADEA. As we shall see, the ADEA claim requires a far more searching scrutiny of the evidence.

Id.

On the ADEA claim, the court rejected the evidence and justifications proffered by the city and held that the age limitation violated the ADEA. *Id.* at 953. Although it was a rational classification under the Equal Protection Clause, the trial court concluded the ADEA was violated because the City did not show that "*all or substantially all* persons over age 40 could not perform the duties of a police officer effectively." *Id.* at 950. Nor could the City demonstrate that it was impossible or highly impracticable to analyze the physical health of applicants on an individual basis. *Id.* at 953. Moreover, economic considerations could not justify the maximum age for applicants. "Although it is reasonable to believe that persons hired younger will work longer and therefore be a better 'investment', 'economic considerations cannot be the basis of a

BFOQ.”” *Id.* Regardless of how “reasonable” or “rational,” the statute could not satisfy the exacting scrutiny of the ADEA. Thus, the City could refuse to hire the applicants between the ages of 30 and 39, consistent with the rational basis standard of the Equal Protection Clause, but the higher standard imposed by the ADEA prohibited the City from refusing to hire the applicants between the ages of 40 and 70.

The Court’s decision in *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400 (1985), also demonstrates the lack of congruence between the treatment of bona fide occupational qualifications under the ADEA and Equal Protection Clause. Age classifications must be more than convenient, reasonable, or rational, they must be “reasonably necessary . . . [to] the particular business.” *Western Air Lines*, 472 U.S. at 413. Under this objective standard, “some job qualifications may be so peripheral to the central mission of the employer’s business that *no* [age-based classifications] can be ‘reasonably necessary to the [business].’” *Id.* (citing *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224 (5th Cir. 1976)) (emphasis added). “Reasonable necessity” may be shown by establishing that the [state] had a “factual basis for believing that all or substantially all [persons over the age qualifications] would be unable to perform safely and efficiently the duties of the job involved.” *Id.* As an alternative, the state can show that “age was a legitimate proxy for the . . . job qualification by proving that it is ‘impossible or highly impractical’ to deal with older employees on an individual basis.” *Id.* at 414. A rational basis for the classification is insufficient. *Id.*

The ADEA limitations on age-based qualifications effectively create a right to an “individual[ized] evaluation,” precluding the use of age-based classifications permitted by the Equal Protection Clause. *See id.* at 422. While the Equal Protection Clause permits classifications that have a rational basis, the ADEA requires “employers . . . to evaluate employees between the ages of 40 and 70 on their merits and not their

age.” *Id.* “The employer cannot rely on age as a proxy for an employee’s remaining characteristics, such as productivity, but must instead focus on those factors directly.” *Hazen Paper v. Biggins*, 507 U.S. 604, 611 (1993). Thus, the ADEA asks not whether the *classification* drawn has a rational basis, but whether the *individual decision* has a substantial basis. This transforms the right to be free from arbitrary or irrational age-based classifications recognized by the Equal Protection Clause, to an entitlement to heightened scrutiny of individual employment decisions. This gross deviation from equal protection standards all but forecloses the use of age-based classifications permissible under the Equal Protection Clause.

Contrasting the deferential standard of review of age-based classifications under the Equal Protection Clause with the exacting standards of the ADEA, it becomes clear that the ADEA lacks congruence to the rights established by the Equal Protection Clause, and is wholly out of proportion to any supposed state violations of rights. Because the ADEA abandons the rational basis test applicable to claims based on age, and substitutes a much more rigorous test in its place, it grants greater rights than the Equal Protection Clause itself, and exceeds Congress’ section 5 powers.

C. The ADEA Treats Age Classifications Subject to Rational Basis Review the Same as Racial Classifications Subject to Strict Scrutiny

Age discrimination and racial discrimination are not considered equivalent by the Equal Protection Clause. They are not subject to the same level of scrutiny under the Equal Protection Clause of the Fourteenth Amendment, nor do they have the same history in this Nation. Nevertheless, the ADEA subjects age discrimination claims to the same rigorous standard as racial discrimination claims. On its face, the ADEA is not congruent with the protections of the Fourteenth Amendment.

Among other things, the ADEA makes it unlawful for an employer to "fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). This is the same standard used to prevent discrimination on the basis of race under Title VII. Title VII makes it an "unlawful employment practice" to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). There is also an identity of the BFOQ provisions of the ADEA and Title VII. Both the ADEA and Title VII limit the use of age and race as a qualification to where "reasonably necessary to the normal operation of the particular business," 29 U.S.C. § 623(f)(1); 42 U.S.C. 2000e-2(e).

When there is no direct evidence of age discrimination, the case is governed by the same burden-shifting framework that is used for analyzing claims of racial discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973). See *Medina-Munoz v. R.J. Reynolds Tobacco Co.*, 896 F.2d 5, 8 (1st Cir. 1990); *Rothmeier v. Investment Advisers, Inc.*, 85 F.3d 1328, 1332 (8th Cir. 1996); *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1010 (1st Cir. 1979). Under this framework, the plaintiff carries his burden by showing: 1) he belongs to a protected group; 2) he applied for a position for which he was qualified; 3) despite his qualifications, he was rejected; and 4) after his rejection, the position remained open and the employer continued to seek applicants from persons of plaintiff's qualifications. *McDonnell Douglas Corp.*, 411 U.S. at 802. The burden then shifts to the defendant to articulate a legitimate nondiscriminatory reason for its decision. *Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24, 25 (1978).

Whether there is a rational basis for an age-based classification is irrelevant to this analysis.

This elevation of the scrutiny applied to age-based classifications to the same level as applied to racial classifications demonstrates how far the ADEA has gone in creating a new class of rights. Unlike the history of discrimination on the basis of race in voting or employment, there is no “widespread and persisting deprivation” of the constitutional rights of the aged. *See Florida Regents*, 1999 WL 412723, at *11 (indicating that “widespread and persisting deprivation of constitutional rights” is the basis for proper prophylactic section 5 legislation). Thus, the ADEA fails the enforcement standard set forth in *Boerne*.

CONCLUSION

Section 5 of the Fourteenth Amendment to the United States Constitution grants Congress the power to *enforce* against the states the right to equal protection of the laws. This grant of power was neither a blank check for Congress to legislate generally upon life, liberty, or property, nor an authorization to decide what “equal protection of the laws” means. When Congress attempts to decide for itself what “equal protection of the laws” means, by granting individuals greater rights against the states or imposing greater limits on the states than the Fourteenth Amendment provides, Congress is no longer acting within its section 5 power.

The ADEA represents another attempt by Congress to decide for itself what “equal protection of the laws” shall mean. Rather than enforcing the right to freedom from arbitrary or irrational age-based classifications, Congress has replaced the rational basis review of age-based classifications under the Equal Protection Clause, with its own idea of what the Equal Protection Clause should require. This exceeds Congress’ power to *enforce* the guarantees of the Fourteenth Amendment against the states, and is in reality an attempt to amend the

Constitution through ordinary legislation. Permitting Congress to redefine constitutional protections in this fashion ignores the founding fathers' concern over an all too powerful federal government and empowers Congress to obliterate state sovereignty in all circumstances simply by asserting that it is "enforcing" the Equal Protection Clause.

For the reasons set forth above, amicus curiae Pacific Legal Foundation urges the Court to affirm the decision below.

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Respectfully submitted,

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